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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

NO. 74-678 1

WILLIAM S. ELLIS, JR., Trustee in dissolution for Kula Development Corporation, HOWARD S. WHITNEY, and EDITH G. WHITNEY,

Petitioners,

vs.

GEORGE AUGUSTUS POWERS and MACEL WELCOME POWERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

and

APPENDICES A TO D

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISION, STATUTES, AND RULE INVOLVED ...	4
STATEMENT OF THE CASE	
A. Petitioner ELLIS Has Been Precluded from Appearing Without Counsel in the State Court; Petitioners WHITNEY Received No Notice of Motion by Prevailing Respondents for a Second Trial in the State Court	4
B. Upon Removal of Civil Action in Good Faith to U.S. District Court Under Civil Rights Statute, Petitioners Were Punished by Assessment of $250 Attorney's Fees Pursuant to Rule 11, F.R. C.P., for Removal in Bad Faith	8
C. Court of Appeals Denied Preliminary Motion to Dismiss Appeal From Remand Order; Then Dismissed Appeal Therefrom After Full Briefing and Argument, Affirming Award of Attorney's Fees Under Equitable Theory	24

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals So Far Sanctioned Departure from Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision 31

B. The Court of Appeals So Far Departed from Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision 33

C. The Court of Appeals Decided Federal Questions in a Way in Conflict with Applicable Decisions of This Court 34

CONCLUSION 38

CITATIONS

Cases:

Arcambel v. Wiseman, 3 Dall. 306 36
Armory v. Armory, 91 U.S. 356 ... 25
Bell v. School Bd. of Powhatan County, 321 F.2d 494 36
Bolling v. Sharpe, 347 U.S. 497 ... 26, 34
Day v. Woodworth, 13 How. 363 ... 36
Duke Power Co. v. Greenwood Co., 299 U.S. 259 ..... 26, 34
Farmer v. Arabian American Oil Co., 379 U.S. 227 36

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 35,36,37
Hall v. Cole, 412 U.S. 1 ..... 30,31,34, 35,36,37
Hauenstein v. Lynham, 100 U.S. 483 36
In re Ellis, 53 Haw. 23, 487 P. 2d 286, cert. den. 405 U.S. 1075 (1972) 5
In re Los Angeles Pioneer Society, 217 F.2d 190 32
In re Murchison, 349 U.S. 133 ... 26,34
Mills v. Electric Auto-Lite Co., 396 U.S. 375 30,35
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 ... 36
Oelrichs v. Spain, 15 Wall. 211 ... 36
Philip v. Nork, 17 Wall. 460 ... 36
Reynolds v. Stockton, 140 U.S. 254 26,34
Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473 36
Smith v. United States, 360 U.S. 1 26,34
Sprague v. Ticonic National Bank, 307 U.S. 161 35
Steward v. Sonneborn, 98 U.S. 187 36
Teese v. Huntingdon, 23 How. 2 ... 36
Vaughn v. Atkinson, 369 U.S. 527 36
Windsor v. McVeigh, 93 U.S. 274 26,34

United States Constitution:

Fifth Amendment 3, 4, 31
Fourteenth Amendment 5, 6

Statutes:

28 U.S.C.A.

Sec. 1254(1) 2
Sec. 1447(c) 14, 32, 37
Sec. 1447(d) 37

Rules:

Federal Rules of Civil Procedure

Rule 6(d) 3, 9
Rule 11 ..... 3, 8, 23, 30, 31, 32, 33, 34

Treatise:

6 Moore's Federal Practice, sec. 54.77[2], p. 1709 (2d ed. 1972) 36

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WILLIAM S. ELLIS, JR., trustee in dissolution for Kula Development Corporation, HOWARD S. WHITNEY, and EDITH G. WHITNEY, Defendants in No. 73-3792, U.S. District Court for the District of Hawaii (hereinafter called the "U.S. District Court"), and Appellants in No. 73-2350, U.S. Court of Appeals for the Ninth Circuit (hereinafter called the "Court of Appeals"),

respectfully pray that a petition for a writ of certiorari issue to review the judgment of the Court of Appeals entered in this case on July 1, 1974.

OPINIONS BELOW

On May 2, 1973, the U. S. District Court entered its Order Granting Motion for Remand and Awarding Attorney's Fees for Violation of Rule 11, Federal Rules of Civil Procedure (unreported), a copy of which is annexed hereto as Appendix A.

The Court of Appeals rendered a Memorandum Opinion on July 1, 1974 (unreported), a copy of which is annexed hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed on certiorari was entered on July 1, 1974, at a time unknown to Petitioners. A copy of the notice of entry is annexed hereto as Appendix C. No petition for rehearing was filed with the Court of Appeals.

On October 2, 1974, the Honorable W. O. Douglas, Associate Justice of this Court, ordered an extension of time to and including November 28, 1974, to file this petition.

The jurisdiction of this Court to review this case on certiorari is invoked under Sec. 1254(1), 28 U.S.C.A.

QUESTIONS PRESENTED

1. When, absent an ex parte application showing cause therefor, a federal district court shortens notice for hearing on a motion to less than the 5 days prescribed in Rule 6(d), F.R.C.P.,

a. Does the court exceed its jurisdiction under law; and/or

b. Are the adverse parties denied due process of law guaranteed by the Fifth Amendment to the U.S. Constitution?

2. When plaintiffs prevail on a motion for remand in a case where two of the three joint petitioners for removal are represented by counsel and the third appears pro se, and the federal district court enters an order under Rule 11, F.R.C.P., awarding attorney's fees to plaintiff's counsel, to be paid by the petitioning litigants,

a. Does the district court exceed its jurisdiction under law; and/or

b. Are petitioners denied due process of law and equal protection of the laws guaranteed by the Fifth Amendment to the U.S. Constitution?

3. Where a federal district court employs Rule 11, F.R.C.P., to punish petitioners and to chastise their attorney in a civil action removed in good faith under civil rights statutes,

a. Does the district court exceed its jurisdiction under law; and/or

b. Are petitioners denied due process of law and equal protection of the laws guaranteed

by the Fifth Amendment to the J.S. Constitution?

4. Where a court of appeals denies appellees' motion to dismiss an appeal from an order of remand in a civil action removed to the district court under civil rights statutes, and the appeal is then fully briefed and argued, is the court of appeals then precluded by the law of the case or by its authority under law, generally, from dismissing the appeal?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

Constitutional provisions, statutes, and rule involved are set forth in Appendix D to this petition.

STATEMENT OF THE CASE

A. Petitioner ELLIS Has Been Precluded from Appearing Without Counsel in the State Court; Petitioners WHITNEY Received No Notice of Motion by Prevailing Respondents for a Second Trial in the State Court.

Civil No. 73-3792 is removed Civil No. 26954, First Circuit Court, State of Hawaii (hereinafter called the "State Circuit Court"), a mortgage suit in which Kula Development Corporation was the mortgagor defendant until its dissolution. Upon dissolution and for 20 months thereafter, Petitioner ELLIS appeared without counsel in the State Circuit Court as successor mortgagor defendant with the acquiescence of Respondents POWERS, the mortgagee plaintiffs therein.

At trial on the foreclosure complaint, ELLIS elected to stand on his rights to procedural due process guaranteed by the 14th Amendment to the U.S. Constitution and was excused from participation. Trial proceeded ex parte and a decree of foreclosure was entered by the State Circuit Court on October 30, 1970.

In the meantime, POWERS instituted by motion and prosecuted an unprecedented original proceeding in the Hawaii Supreme Court, No. 5044, to prevent ELLIS from appearing without counsel. The Order to Show Cause entered October 13, 1970, in No. 5044 directed ELLIS to show cause,

> "why a permanent injunction should not issue forever enjoining you as trustee for the creditors and shareholders of Kula Development Corporation from practicing law without a license within the Courts of the State of Hawaii."

Appearing in his own defense, ELLIS responded: (1) that pro se appearance is not the practice of law and has never been characterized as such; however, (2) if the Hawaii Supreme Court should characterize pro se appearance by a liquidating trustee to be the practice of law, he would refrain from such.

In an opinion entered June 25, 1971, the Hawaii Supreme Court characterized pro se court appearances by ELLIS as the unauthorized practice of law and found him "guilty." However, the court conditionally authorized him to continue to appear without counsel if he could prove imperative financial necessity therefor. In re Ellis, 53

Haw. 23, 487 P.2d 286, cert. den. 405 U.S. 1075 (1972).

ELLIS filed his written election to stand on his rights guaranteed by the 14th Amendment to the U.S. Constitution ("dismissed" sua sponte by the Hawaii Supreme Court) and declined to submit the affairs of the dissolved corporation to a judicial inquiry. He also presented motions for reconsideration grounded on the 14th Amendment to the U.S. Constitution.

On August 18, 1971, ELLIS was informed by a letter from the Clerk of the Hawaii Supreme Court, approved by the chief justice, that:

> "They have not been filed and are being returned to you because of your lack of standing to file said documents. Any other documents or pleadings which you may improvise for filing in this case will be returned without filing."

Having thus been denied access to the Hawaii Supreme Court to continue appearing in his own defense to a criminal charge, ELLIS removed No. 5044 to the U.S. District Court on September 24, 1971, where the case was docketed as Misc. No. 71-1564. Unknown to ELLIS, a Final Judgment had been entered the previous afternoon in the Hawaii Supreme Court, which ordered as follows:

> "IT IS HEREBY ORDERED AND ADJUDGED that William S. Ellis, Jr., trustee for the creditors and stockholders of Kula Development Corporation, is permanently enjoined from engaging further in the unauthorized practice of law."

ELLIS appeared without counsel in the removed case, where the POWERS sought to intervene and move for remand. Intervention was denied. After a hearing upon the suggestion of lack of federal jurisdiction, the U.S. District Court concluded inter alia in its order of remand entered October 22, 1971:

> "A review of the proceedings had before the Supreme Court of Hawaii convinces this Court that the matter was in no way a criminal prosecution, though so labeled by Mr. Ellis. It was in the nature of a special proceeding before the Supreme Court of Hawaii and within its inherent power to regulate the practice of law before the state courts of Hawaii." (Emphasis added.)

The POWERS did not attempt to execute the decree of foreclosure entered on October 30, 1970, in Civil No. 26954. Late in 1972, they sought and were denied an entry of "default" against ELLIS for failure to employ counsel in the foreclosure suit. Next they moved for a second trial therein, stating no grounds. The motion was granted and a copy served on ELLIS on March 16, 1973.

Subsequent to the decree of foreclosure and prior to the motion for a second trial, Petitioners WHITNEY were substituted as defendants in Civil No. 26954 by virtue of their succession to claims of judgment creditors. However, the POWERS served no motion papers on the WHITNEYS, who were informed of the second trial by ELLIS.

B. Upon Removal of Civil Action in Good Faith to U.S. District Court Under Civil Rights Statute, Petitioners Were Punished by Assessment of $250 Attorney's Fees Pursuant to Rule 11, F.R.C.P., for Removal in Bad Faith.

On April 6, 1973, a verified Petition for Removal (of Civil No. 26954) was filed in the U.S. District Court as Civil No. 73-3792. After alleging some of the foregoing facts and others, the petition further alleges:

> "24. Because of the circumstances related above, your petitioners are unable to enforce in the State Court their rights to equal protection of the laws granted by the rules, statutes, and constitutional provisions of the State of Hawaii, and the statutes and constitutional provisions of the United States.
>
> "25. Upon the receipt of said Order Setting Case for Trial on March 16, 1973, and April 3, 1973, respectively, your petitioners ELLIS and WHITNEY ascertained that this action is removable.
>
> "26. Removal jurisdiction of this Court is invoked pursuant to Sec. 1441, et seq., 28 U.S.C.A., particularly Secs. 1441(c) and 1443."

Petitioners then followed prescribed procedures to perfect removal. Service of pertinent papers upon POWERS was made by delivery to their counsel on April 9, 1973.

At 2:40 o'clock P. M., April 18, 1973, POWERS filed Motion for Remand; Motion for Costs and Attorney's Fees, and supporting papers. Ten minutes later, the district judge entered an ex parte Order Fixing Time for Hearing, advancing hearing on the POWERS motions, pursuant to Rule 6(d), F.R.C.P., to April 23, 1973. The papers were served by mail. The intervening days included Good Friday, Saturday, and Sunday.

The Petitioners filed the following objections to advancement of the hearing:

> "1. Notice is insufficient under Rules 6(a) and 6(d), F.R.C.P.
>
> "2. The Order Fixing Time for Hearing entered April 18, 1973, is void for failure of Plaintiffs to comply with Rule 7(b)(1), F.R.C.P., and because of denial by the Court of due process of law guaranteed by the 5th Amendment to the U.S. Constitution."

Petitioner ELLIS, a resident of the Island of Maui who spends a portion of each week in Honolulu, also filed on April 19, 1973, Notice of Prior Commitments with supporting exhibit and Suggestion of Recusal by the Honorable Martin Pence. The court and counsel for POWERS were thus informed that ELLIS could not and would not appear on April 23, 1973.

At 11:35 o'clock A. M., April 23, 1973, Motion for Remand was called for hearing. Counsel for WHITNEYS was present; ELLIS was absent. Pertinent excerpts from the Transcript of Proceedings follow:

"MRS. RYAN: . . . I am really appearing specially because of the lack of proper notice in this matter. I received papers Thursday morning."

. . .

"MR. JAFFE: Your Honor, I think we can cure that defect. I have here a written motion for leave to file an amended ex parte motion for order fixing time for hearing and the proposed amended ex parte motion for order fixing time for hearing which -- . . .

"Treating the oral motion which I made before Your Honor last week as a motion as indeed it is and treating the amendment as a pleading, I asked for leave to file the amended motion which under Rule 15c would relate back to the date of the oral motion which I believe was April 18th, 1973, and would cure this procedural problem."

. . .

"MRS. RYAN: . . . I received this motion at my office, as I said, about 11 o'clock on Thursday. I had commitments for Thursday. Our office or at least my section of the office was closed on Friday which was a State holiday and I was to be here at 11:30 on Monday in response to I think a terribly complicated motion."

. . .

"THE COURT: . . . Mrs. Ryan, have you had a chance to study the law involved

in the petition for remand?"

"MRS. RYAN: As I understand the petition for remand, it does involve a federal question, but in his memorandum he raises a point which I certainly was not familiar with and he says that when you come on a remand case under the civil rights statute it has to be a question of racial discrimination which is something new to me."

"THE COURT: Well, I'll read you what he had in mind, if you haven't already read it -- Georgia vs. Rachel."

"MRS. RYAN: This is the case that he cited?"

"THE COURT: Yes."

"LAW CLERK LERMAN: No, Judge, that's not the case he cited."

"THE COURT: Georgia vs. Rachel."

"MR. JAFFE: No, I cited Georgia vs. Spencer."

. . .

"THE COURT: Well, Georgia vs. Rachel laid down the basic law. That's 384 U.S. 780 where it goes into the history behind 1443 and the phrase in 1443(1) 'any law providing for . . . equal civil rights' means any law providing for specific civil rights stated in terms of racial equality. . . . There goes your ball game on 1443."

"MRS. RYAN: Well, if the Court

please, I haven't had an opportunity to look at this and the only ---"

"THE COURT: Whether you've had an opportunity or not, that's the law and that's the way in which I'd rule on it, but I'm not going to say -- I'm not going to deny you a chance to look into it."

"MRS. RYAN: I would like a period of time to respond with a written memorandum."

"THE COURT: I don't need a written memorandum. I'm prepared to rule on argument."

"MRS. RYAN: Well, I'm not prepared to argue."

"THE COURT: I cannot and will not under the circumstances -- recognizing that last Friday was Good Friday . . . Let me see, (perusing calendar) Thursday, Friday -- 4 o'clock Thursday, April 26th."

. . .

"MR. JAFFE: . . . I really would like to have the amended ex parte motion accepted and filed."

"THE COURT: Since I'm setting it for Thursday, I will accept your ex parte motion and grant the same and set it for Thursday at 4 o'clock."

. . .

"MRS. RYAN: I'm sorry, Your Honor,

I don't know what motion he's talking about."

"MR. JAFFE: The motion for leave to file an amended motion setting the time for hearing (document handed) and the amended motion to which it refers (document handed)."

. . .

"MRS. RYAN: Well, if Your Honor please, . . . I have never had an experience quite like this in 35 years of practice of law. The fact that you are given only a day to prepare to be cured by two more pieces of paper just seems to be ---"

"THE COURT: Counsel, I set it for Thursday at four. . . . I could have very frankly said: We'll go ahead with it right now, but I'm not going to do that."

At 11:48 o'clock A.M., April 23, 1973, POWERS filed Motion for Leave to File Amended Ex Parte Motion for Order Fixing Time for Hearing:

"Plaintiffs . . . respectfully move this Honorable Court to grant them leave to file an Amended Ex Parte Motion for Order Fixing Time For Hearing.

"This motion is based upon Rule 15, Federal Rules of Civil Procedure and the files and records herein."

Concurrently, POWERS filed Amended Ex Parte Motion for Order Fixing Time for Hearing:

"Plaintiffs . . . respectfully move this

Honorable Court to fix the time for hearing on their Motion for Remand and Motion for Costs and Attorney's Fees for 11:30 o'clock A.M. on April 23, 1973, before the Honorable Martin Pence.

"This Motion is based upon Rule 6(d), Federal Rules of Civil Procedure and upon the prior oral representation by plaintiffs' counsel that the removal of the instant action appears to have been effectuated solely for purposes of delay."

Copies of both motions were deposited for service by mail on the same day.

On April 25, 1973, Petitioners filed Memorandum re Attorney's Fees . . . , contending that POWERS are not entitled to attorney's fees for remand proceedings. Petitioners point out that POWERS' reliance upon 28 U.S.C.A., Sec. 1447(c), is misplaced, for the reason that the statute makes no provision for attorney's fees to a party prevailing on a remand motion.

On April 26, 1973, at 2:30 o'clock P.M., rather than at 4:00 o'clock, further proceedings were had in the U.S. District Court. WHITNEYS were represented by counsel; ELLIS was absent. Pertinent extracts from the Transcript of Proceedings follow:

"MRS. RYAN: . . . We are removing the case because of the order setting the case for trial in the First Circuit Court of the State of Hawaii. . . . This case has been tried, quote-unquote, in the First Circuit. . . . There were findings of fact and

conclusions of law and a decree of foreclosure entered in the First Circuit Court which were never served upon me and . . . Mr. Ellis . . .

"Now what the plaintiff has done is that he has procured in the State court of Hawaii an order allowing him to retry a civil case which he himself brought on for trial, tried apparently and received his decree which he requested."

. . .

"THE COURT: How do we get up here though? . . ."

"MRS. RYAN: . . . There is no procedure known to man where after you have tried a case and received an order from the court that you can start one-half the way back in your court folio and say: All right, boys, we're going to start and now we're going to have a trial in this case. This is a remedy which Mr. ---"

"THE COURT: What is a remedy?"

"MRS. RYAN: This order setting case for trial after the case has been tried. . . . The entry of this order ---"

"THE COURT: How did it get up here, if its going to stay here?"

"MRS. RYAN: All right. The order setting the case for trial was the act which deprived the party-defendants of the equal

protection of the law."

"THE COURT: Now then if that's all you have, the ball game is over."

"MRS. RYAN: . . . And the due process of law."

"THE COURT: If that's all you have the ball game is over because you have the State courts. You don't bring it up here."

"MRS. RYAN: But, under the civil rights section ---"

"THE COURT: What civil rights section?"

"MRS. RYAN: Under Title 42, 1983, and under Title 28, 1343, the district courts have jurisdiction of instances such as this where a person is deprived of the due process of law and equal protection of the law in the State courts. Now the case which was cited by the Court at the last hearing involves removal on a criminal action and---"

"THE COURT: Does it make any difference. . . whether it's criminal or civil?"

"MRS. RYAN: It makes a great deal of difference. . . . Both in removal and in trying to get the federal court to exercise its jurisdiction under the civil rights sections in terms of injunctions and the courts have . . . historically held . . . that they do not wish to increase the business of the federal court system and in both granting injunctive relief or allowing a defendant in a

criminal action to come into this court and also to allow him to remove his case to this court, they have read the statute with a reversed magnifying glass, but I spent . . . an hour and a half over in the Supreme Court Library checking out the case which Your Honor cited me and it has been used in other criminal cases, but I could not find a single case in which it has been applied in a civil action."

. . .

"THE COURT: All that we can go by is what is set forth in the petition for removal. Now what is in the petition for removal? What is involved?"

"MRS. RYAN: . . . The fact that the case was set down for trial over there . . . that the plaintiff proceeded to get its order that it wanted from the court . . . that apparently then after it came back from upstairs on In Re: Ellis decided that it had destroyed the validity of the order which it had secured and instead of starting over it merely notices the case for trial again.

"Now this to me, if we're talking about procedural due process, is about the most outrageous thing you can do."

"THE COURT: As pointed out in your . . . 'Petition for Removal,' you bottom it on . . . 28 U.S.C. 1441. . . . And 1443."

. . .

"MRS. RYAN: But, the order . . . from which the removal is taken is the act of depriving the defendants of their rights, privileges and immunities under the constitution."

. . .

"MR. JAFFE: . . . First of all, Your Honor, you don't remove orders to federal court, you remove cases to federal court. . . . No federal claim independently supportive of federal jurisdiction is made either in the complaint by the plaintiff or in any of the counterclaims against the plaintiff. . . .

"Now, I had fully expected coming in here today to hear almost a withdrawal of the claims under Section 1443 of Title 28 United States Code. In the event that I didn't hear them voluntarily from Mrs. Ryan, I was prepared to make a request which I request now pursuant to Rule 11 which requires good faith signing of pleadings. In view of the uniform state of the law regarding Section 1443, it's difficult for me to see how a pleading alleging that this particular case is removable under that section can be signed in good faith either by an attorney representing a party or by a party representing himself pro se. Rule 11 provides that if a pleading is signed with the intent to defeat the purpose of that rule: 'It may be stricken as sham and false and the action may proceed as though the pleading had not been served.'

"Now if the Section 1443 claim was

made in good faith . . . by Mr. Ellis and Mrs. Ryan without actual knowledge of the uniform state of the case law, then I call upon them to voluntarily withdraw that claim."

"THE COURT: Do you wish to do so?"

"MRS. RYAN: No, Your Honor."

"THE COURT: That's answered.

. . .

" . . . As indicated on the prior occasion when Mrs. Ryan was here, . . . I indicated to Mrs. Ryan that I felt that any reliance which she might have had on a superficial reading of Sections 1441 and 1443 was entirely misplaced. . . . I had expected Mrs. Ryan to, after reading the section . . . that she would . . . voluntarily accept the remand. Clearly she hasn't. Continuation, as this Court sees it -- continuation indicates either that she didn't read the cases or wasn't concerned with what they said. Very frankly, Mrs. Ryan, the message is there clear, as this Court reads it, that there were no grounds set forth whereby this case properly should have been removed to this court. No federal claim of any substance whatsoever is set forth in the entire file and the removal petition -- nothing therein supports federal jurisdiction. Therefore, the motion for remand is granted.

"Now in the matter of attorney's fees. There's nothing in the words involving the

bond which indicates that attorney's fees . . . are expected to be something normally taken out of the bond. The bond, as you are aware, is for the purpose of costs and expenses that would normally occur in connection with the cases. The Court has an inherent power whenever, as Mr. Shields I think it was might remember -- are you aware of that case? The Shields case? Are you aware of that case?"

"MRS. RYAN: I don't ---"

"THE COURT: You are not aware of the Shields case that I just now referred to. I said: The Court has the inherent power, as Mr. Shields might remember. Mr. Shields filed what I construed as a strike suit in this court not so long ago and what was it $4,800 attorney's fees -- I think that was the figure ---"

"MR. JAFFE: I think so."

"THE COURT: --- that I graciously placed within his obligation to pay. The basis must be something which is -- the Court can determine was so futile, so fictitious, so wrong that it borders upon almost an afront to the Court to file it and in that case I assessed attorney's fees. Absent some situations that attorney's fees are not ordinarily granted, it would demand in this case that I find on the record here, if I were to impose any attorney's fees or award attorney's fees to you, Mr. Jaffe, would be because I would find that the attempted removal had not been made in good faith.

Well, I find it was not. I find that Mrs. Ryan and Mr. Ellis, the two of them, in purporting to try to bring the case up here under Section 1441 and 1443 either didn't read the law, didn't read the cases or they didn't care. That's the only way I can construe it. When I see the entire file here of the actions over on the state side and see the attempt, abortive as it is, to bring the case up here, I can only find that there was a complete disregard on the part of Ellis and Mrs. Ryan acting as attorney for her clients to their obligation to see what the law is before they try to invoke it. Not having done so, Rule 11 has been violated and I find it has been violated in this case.

"You have made how many appearances?"

"MR. JAFFE: Two."

. . .

"THE COURT: Can you give me a . . . time in which you would say that you know that you put in 'X' amount of time?"

"MR. JAFFE: I know I've put in at least five hours."

"THE COURT: Five hours. Very well, I'm going to award $250 attorney's fees payable by the clients of Mrs. Ryan and Mr. Ellis equally within fifteen days."

. . .

"MR. JAFFE: If we might have a ruling on the Rule 11 motion to strike the

reference to 1443 to avoid what I see the inevitable next step in this outrageous delay."

"THE COURT: Strike it or not will make no difference. I've held that 1441 and 1443 have absolutely no application to this and the very fact that the attempted removal was based upon those two is foundation for my order allowing you attorney's fees.

" . . . Stand in recess.

"Four o'clock, Mr. Clerk, you will be here and see if Mr. Ellis shows up and, if he does, notify Mr. Jaffe and we'll let Mr. Ellis say what he wants to say and he'll hear the same words that I have just now said."

The proceedings adjourned at 3:00 o'clock P. M. Forty-five minutes later, ELLIS filed a Memorandum Opposing Motion to Shorten Notice with supporting affidavit and an Election . . . to Stand on His Constitutional Rights. He did not appear before the court. In pertinent part, the affidavit attests:

"3. Removal of the instant action was not effectuated for purposes of delay. Rather, said action was removed in good faith, as a sincere attempt to achieve equal protection of the laws respecting (a) due notice and an opportunity to be heard, (b) right of a natural person to appear pro se as a party to litigation, and (c) the restriction of successful plaintiffs to one trial where defendants do not procure a new trial or reversal.

"4. Affiant verily believes that he has been treated as persona non grata in the

State Courts because of circumstances of birth, residence, race, consensus politics, debtor status, and pro se status. As such, he is a 'nigger' in the predominantly Nisei, consensus-controlled State Courts, unable to enforce his equal rights as a Mainland-born, white, pro se debtor, under the laws and constitutions of the State of Hawaii and the United States."

On May 2, 1973, the court entered its Order Granting Motion for Remand and Awarding Attorney's Fees for Violation of Rule 11, Federal Rules of Civil Procedure (Appendix A). The order, which also contains "findings" of lack of good faith on the part of ELLIS and counsel for WHITNEYS, was prepared by counsel for POWERS and entered without approval as to form or any opportunity to object to its form. The order per se reads as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

"1. That plaintiffs' Motion For Remand be, and the same hereby is, granted and this case is hereby remanded to the Circuit Court of the First Circuit, State of Hawaii, this court retaining only such jurisdiction as is necessary to enforce the order for the payment of attorney's fees in the next paragraph hereof.

"2. That defendants Whitneys and Ellis are hereby ordered to pay to Edward A. Jaffe, counsel for plaintiffs, within fifteen (15) days from the date hereof, the sum of $250.00 to reimburse plaintiffs for their

attorney's fees occasioned by the gross and blatant violation by defendant Ellis and counsel for defendants Whitney of Rule 11, Federal Rules of Civil Procedure."

On May 8, 1973, the Petitioners filed their Notice of Appeal:

> "Defendant ELLIS appeals from paragraph 1 of said Order (remanding the case) to the extent that the interlocutory Order Fixing Time for Hearing entered on April 18, 1973, and matters pertinent thereto are merged in said final judgment.
>
> . . .
>
> "Defendants WHITNEY and ELLIS appeal from paragraph 2 of said Order (awarding attorney's fees) and all matters pertinent thereto merged in said final judgment."

On May 11, 1973, the Petitioners deposited $300.00 in the registry of the U.S. District Court and obtained an Order for Supersedeas, which stayed enforcement of the second paragraph of the order appealed.

C. Court of Appeals Denied Preliminary Motion to Dismiss Appeal From Remand Order; Then Dismissed Appeal Therefrom After Full Briefing and Argument, Affirming Award of Attorney's Fees Under Equitable Theory.

POWERS requested a partial record from the U.S. District Court, transmitted May 11, 1973, in order to present a preliminary Motion to Dismiss Frivolous Appeal; Motion for Attorney's Fees, served May 14, 1974. POWERS contended

that Petitioners,

> "... have no right to appeal the instant order remanding this case to the State Court because no allegation of racial discrimination sufficient to come within Title 28, U.S.C.A. Section 1443 has been made in the pleadings or the Petition for Removal. This case therefore presents no substantial question for review."

In their opposing memorandum served May 18, 1974, Petitioners countered:

> "Appellants have the right to review of interlocutory matters merged in paragraph 1 of the final order appealed, pursuant to 28 U.S.C.A., Sec. 1447(d) ...
>
> "The appealed matters merged in paragraph 2 of the May 2, 1973, order are ancillary or collateral, unrelated to the merits of removal jurisdiction. Therefore, Appellants have an absolute right to appeal without regard to Sec. 1447(d). Albi v. Street & Smith Publications, Inc. (9 Cir., 1944), 140 F.2d 310, 311; 28 U.S.C.A., Sec. 1291."

Petitioners also quoted Armory v. Armory, 91 U.S. 356, 357, in support of their contention.

On September 6, 1973, a panel consisting of Circuit Judges Merrill and Goodwin denied the POWERS motion to dismiss the appeal.

A comprehensive 53-page Brief of Appellants was subsequently filed. Argument included the following points:

"2. Due Process of Law, Guaranteed by the Fifth Amendment to the U.S. Constitution, Requires Appropriate Notice and a Fair Hearing.

"3. Proceedings on Motion for Remand, etc., Are Void for Insufficiency of Notice.

. . .

"5. Parties to Litigation Are Not Subject to the Disciplinary Sanction of Rule 11, F.R.C.P.

"6. Rule 11 Was Employed Below in a Constitutionally Impermissible Way to Punish Petitioners and to Chastise Their Attorney for Attempting to Secure Their Civil Rights Through a Removal Action."

In support of points 2 and 3, Petitioners relied upon the following decisions of this Court; Windsor v. McVeigh, 93 U.S. 274, 282; Reynolds v. Stockton, 140 U.S. 254, 268; Smith v. United States, 360 U.S. 1, 10; Duke Power Co. v. Greenwood Co., 299 U.S. 259, 268; In re Murchison, 349 U.S. 133, 136; and Bolling v. Sharpe, 347 U.S. 497, 499.

In arguing point 6, Petitioners represented to the Court of Appeals:

> "When Petitioners went into the district court on the issue of attorney's fees, it was on the Mortgagees' moving papers where the argument ran that the 'payment of just costs' provision of 28 U.S.C.A., Sec. 1447(c), included the right to impose attorney's fees . . .

"Petitioners had already responded . . . that Sec. 1447(c) does not provide for attorney's fees . . . With this the district court agreed. The district court, however, asserted that it had 'inherent power' to impose attorney's fees under Rule 11 . . .

"Looking behind the phrases used by the district court to describe the conduct of Petitioner ELLIS and the attorney for Petitioners WHITNEY, we find that the 'bad faith,' the 'complete disregard . . . of their obligation to this court to investigate the state of the law,' the 'blatant violation of Rule 11' . . . involve the reference in the removal petition to 28 U.S.C.A., Sec. 1443 . . .

. . .

"The 'exquisite obscurity' of the language of this section was commented on in Baines v. Danville, 35 F.2d 756, and by the time that case reached the Supreme Court (384 U.S. 890), the Supreme Court itself had further obscured its meaning by juxtapositioning Greenwood v. Peacock, 384 U.S. 808, with Georgia v. Rachel, 384 U.S. 780.

"In 1972, the Fifth Circuit wrote that it had 'interpreted the scope of removal under Sec. 1443 seventeen times in the wake of Peacock and Rachel.' . . ."

. . .

"On the adjourned date, the district court refused to consider the fact that the Rachel case involved the removal of a

criminal and not a civil action, and had never been cited in a civil action . . . At this point, the Rachel case became 'the uniform state of the case law' . . . , and counsel for Petitioners WHITNEY was asked to 'voluntarily withdraw' the claim. Upon her refusal to do so, the district court declared that 'either . . . she didn't read the cases or wasn't concerned with what they said' . . .

"Counsel for Petitioners WHITNEY is very concerned with what the Rachel case says, if it says that neither a criminal nor a civil litigant can remove a case to a federal district court under Sec. 1443, unless he is a Negro.

"The Negroes in the South have been denied their civil rights in criminal matters in the same way as the Petitioners are denied their civil rights in civil litigation in Hawaii. It was not only the Negroes who were affected by the southern discrimination. The white lawyer, caught up in the system, refused to honor his oath of office, and allowed the courts to deprive his clients of their constitutional rights without objection. This failure has been judicially noticed by the U.S. Court of Appeals, Fifth Circuit, and is known as the Harpole doctrine. . . . "

. . .

"At the expense of the tireless and fearless work of a dedicated group of civil rights attorneys who worked in the South, the 'uniform state of the law' has moved from 'separate but equal' into integration.

Obviously, no progress would have been made had the attorneys allowed themselves, under the threat of a Rule 11 sanction, to agree with any judge that any law was immutable."

. . .

"In pre-1964 amendment days, removal (albeit unsuccessful) was purposefully employed by civil rights attorneys in the South as one of the weapons against actually discriminatory use of criminal statutes which were non-discriminatory on their face. This, in spite of Virginia v. Rivis, (1879), 100 U.S. 313, which represented 'the uniform state of the case law.' . . .

"If we are to achieve the dream of middle America for a law-and-order society, the doors of the courthouses must be left open, and the lawyers who enter them left free to speak their minds on the law and their ideas as to its application."

In the Brief of Appellees, POWERS argued contra:

"I. The Order for Remand Is Not Appealable.

"II. The Award of Attorney's Fees Was Amply Justified.

. . .

"IV. The Manner in Which the Hearings on the Motion for Remand Were Scheduled Does Not Constitute Reversible Error."

In support of point II, POWERS for the first time relied, inter alia, upon Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-392; and Hall v. Cole, 412 U.S. 1, 4-5, respecting traditional equitable powers to award attorney's fees.

In their Reply Brief, Petitioners responded that the U.S. District Court had awarded fees as a penalty under Rule 11, F.R.C.P.

> ". . . because Petitioner WHITNEY's attorney refused to agree that Negroes had civil rights that were denied to persons who had lighter skins but suffered the same kind of discrimination . . .
>
> "Mortgagees do not cite a single case justifying this. Nor do they cite a single case in which a person seeking federal court jurisdiction to protect civil rights has been fined under Rule 11."

Notwithstanding denial of dismissal on the preliminary motion decided by Circuit Judges Merrill and Goodwin, a different panel of the Court of Appeals comprised of Circuit Judges Duniway, Choy, and Sneed concluded on July 1, 1973 (Appendix B), that the court had no jurisdiction to entertain the appeal from the remand order (i.e., paragraph 1 of the order appealed, Appendix A). Therefore, the appeal was dismissed as to the collateral due process issue (points 2 and 3 in Brief of Appellants; opposed in point IV of Brief of Appellees).

The award of attorney's fees (i.e., paragraph 2 of the order appealed) was affirmed as "a proper exercise of the traditional equitable

powers of the district court," entirely without reference to Rule 11, F.R.C.P., citing Hall v. Cole, supra.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals So Far Sanctioned Departure from Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

1. Advancement of Hearing on Remand. Proceedings on removal commenced with a "blitz" notice of a motion for remand obviously intended to deny Petitioners access to the federal courts without an adequate opportunity to prepare their opposition. It also deprived Petitioner ELLIS of an opportunity to present an adequate affidavit of bias to disqualify the district judge.

Hearing on the motion was advanced, absent any judicial authority whatsoever--the record a total void of any just cause for advancement of hearing.

This flagrant denial of due process was purportedly "cured" by an incredible combination of (a) a motion for leave to amend the nebulous ex parte motion on which the order to advance hearing was based, and (b) a written "amended" motion to support advancement nunc pro tunc.

Petitioner ELLIS stood on his rights to procedural due process under the Fifth Amendment to the U.S. Constitution and did not respond to the merits of the motion for remand. He appealed the due process issue as a collateral matter merged in the order of remand (paragraph 1, Appendix A). By dismissing the appeal from the

order of remand, the Court of Appeals so far sanctioned the foregoing departure from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. Assessment of Attorney's Fees. Respondents sought attorney's fees upon remand under statutory authority of Sec. 1447(c), 28 U.S.C.A. Petitioners pointed out that reliance upon the statute was misplaced; the District Court concurred that there is no statutory authority for the award of attorney's fees upon remand.

Then, without prior notice and in the absence of ELLIS, the District Court commenced and concluded a disciplinary proceeding which consisted entirely of the announcement of its decision. (Cf. In re Los Angeles Pioneer Society, 217 F.2d 190, 191, 194, wherein the Court of Appeals condemned similar judicial proceedings.)

Petitioners were assessed $250 in attorney's fees for the reason that counsel for Petitioners WHITNEY refused to submit to judicial intimidation and repudiate her sincere intent upon participating in removal of the unprecedented case.

The sudden judicial maneuver was grounded upon Rule 11, F.R.C.P., promulgated by this Court. The rule provides, inter alia, for sanctions against counsel. It makes no provision for sanctions against parties.

Appendix A vituperates ELLIS and counsel for WHITNEYS and fines Petitioners by judicial act in total disregard of equitable considerations. By affirming this abuse of judicial power as a

"proper exercise of the traditional equitable powers of a district court," the Court of Appeals so far sanctioned departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Because of the nominal amount of the fine, it is apparent that the cost of vindicating Petitioners' rights is all out of proportion to any financial benefits which might be derived. In essence, Petitioners are functioning as "private attorneys general" in a dogged effort to restore respect for the law to the courtrooms of Hawaii, both state and federal. Absent respect for the law by the judicial forum itself, the whole concept of justice under the laws and Constitution of the United States is sheer mythology.

The basic issue is the inherent power of the court vs. the litigants' inherent right to justice. It is respectfully submitted that this Court has not only the supervisory power but the supervisory duty to preserve inviolate the litigants' inherent right to justice in the United States, and to subserve the inherent power of the court to that end.

B. The Court of Appeals So Far Departed from Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Neither of the Petitioners appealed remand per se. WHITNEYS appealed matters relating to an additional removal bond merged in the order of remand (paragraph 1, Appendix A); ELLIS appealed the due process issues merged therein. Both Petitioners appealed the assessment of attorney's fees under Rule 11, F.R.C.P. (paragraph 2, Appendix A).

Petitioners' right to appeal all three aspects of Appendix A was vindicated on a preliminary motion to dismiss the appeal. That is, the Court of Appeals determined that it had appellate jurisdiction. Petitioners fully briefed all points involved, stressing the lack of judicial authority and of factual basis for assessment of attorney's fees under Rule 11, F.R.C.P.

In its opinion (Appendix B), the Court of Appeals skirted the collateral due process issues appealed by ELLIS and decided it didn't have jurisdiction of such matters after all. The Court then avoided all reference to the Rule 11, F.R.C.P., basis for attorney's fees and decided the case in reliance upon "traditional equitable powers," citing Hall v. Cole, 412 U.S. 1, 4-5.

By thus rendering quixotic Petitioners' efforts to obtain appellate relief, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. The Court of Appeals Decided Federal Questions in a Way in Conflict with Applicable Decisions of This Court.

The Court of Appeals decided matters of procedural due process guaranteed by the Fifth Amendment to the U.S. Constitution contrary to the following decisions of this Court: Windsor v. McVeigh, 93 U.S. 274, 282; Reynolds v. Stockton, 140 U.S. 254, 268; Smith v. United States, 360 U.S. 1, 10; Duke Power Co. v. Greenwood Co., 299 U.S. 259, 268; In re Murchison, 349 U.S. 133, 136; and Bolling v. Sharpe, 347 U.S. 497, 499.

The decision of the Court of Appeals on the assessment of attorney's fees is essentially in conflict with Hall v. Cole, supra, and cases cited therein. In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392, this Court notes that a primary judge-created exception to the general American rule against awarding attorney's fees absent statutory or contractual authorization,

> " . . . has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself."

In Hall, supra, at 7, this Court holds that,

> "The instant case is clearly governed by this aspect of Mills. . . ."

Hence, the following observation in Hall at 5, relied upon by the Court of Appeals is obiter:

> "Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' . . . In this class of cases, the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant."

Further, the quoted observation does not follow from Sprague v. Ticonic National Bank, 307 U.S. 161, 166; Mills, supra; and Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718.

The obiter observation relied upon by the Court of Appeals is rooted in 6 Moore's Federal Practice, sec. 54.77[2], p. 1709 (2d ed. 1972). This Court cites, for example, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, n. 4, which note is in turn an obiter observation quoting Moore.

The "bad faith" justifying attorney's fees in other cases cited relates to the substantive behavior of defendants constituting the gravemen of the actions. In Vaughn v. Atkinson, 369 U.S. 527 (admiralty), this Court held the plaintiff seaman entitled to reasonable counsel fees as damages for failure of defendant to pay for maintenance. Both Bell v. School Bd. of Powhatan County, 321 F.2d 494, and Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473, are injunctive proceedings which invoke equity jurisdiction. Oppressed plaintiffs vindicating their rights to desegregated education and equal opportunities as union members, respectively, were awarded attorney's fees upon equitable considerations.

In short, there is nothing in Hall, supra, to support the decision of the Court of Appeals. The decision is fundamentally in conflict with Fleischmann, supra, at 717, 719, and cases cited therein which uphold the general American rule against such assessments: Arcambel v. Wiseman, 3 Dall. 306; Hauenstein v. Lynham, 100 U.S. 483; Steward v. Sonneborn, 98 U.S. 187; Oelrichs v. Spain, 15 Wall. 211; Day v. Woodworth, 13 How. 363; Farmer v. Arabian American Oil Co., 379 U.S. 227, 225, 236-239; Philip v. Nork, 17 Wall. 460; Teese v. Huntingdon, 23 How. 2. That is to say, the case falls within the general rule, not

the exceptions thereto.

Inasmuch as the Court of Appeals understands this Court to sanction in Hall v. Cole, supra, the arbitrary assessment of attorney's fees to punish litigants for seeking vindication of civil rights under removal statutes, it is incumbent upon this Court to correct this erroneous understanding.

> "In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing includes the fees of their opponent's counsel. . . .
>
> "When a cause of action has been created by statute which expressly provides the remedies for vindication of the cause, other remedies should not be implied. . . . A judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context." Fleischmann, supra, at 717, 719 (emphasis added).

The remedies available to Respondents upon remand are circumscribed by Sec. 1447(c), 28 U.S.C.A., to-wit: "the payment of just costs," bonded pursuant to Sec. 1447(d), 28 U.S.C.A.

CONCLUSION

For the foregoing reasons, Petitioners urge the Court to grant the writ of certiorari to review

the judgment of the U.S. Court of Appeals for the Ninth Circuit.

DATED at Honolulu, Hawaii, November 26, 1974.

Respectfully submitted,

WILLIAM S. ELLIS, JR.
12 N. King Street, Rm. 17
Honolulu, Hawaii 96817

Petitioner, pro se

HELEN B. RYAN
Suite 207, 1136 Union Mall
Honolulu, Hawaii 96813

Attorney for Petitioners
Whitney

Appendix A

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

GEORGE AUGUSTUS POWERS, et ux.,	)	CIVIL NO. 73-3792
Plaintiffs,	)	
vs.	)	
WILLIAM S. ELLIS, JR., Trustee, et al.,	)	
Defendants.	)	

ORDER GRANTING MOTION FOR REMAND AND AWARDING ATTORNEY'S FEES FOR VIOLATION OF RULE 11, FEDERAL RULES OF CIVIL PROCEDURE

This cause having come on to be heard on April 26, 1973 at 2:30 o'clock P. M. on motions of plaintiffs George Augustus Powers and Macel Welcome Powers for Remand and Award of Attorney's Fees and Costs; and

THE COURT having considered the written memorandum submitted by plaintiffs, the written memorandum submitted by defendants Whitneys and Ellis and the oral argument of counsel; and

THE COURT being otherwise fully advised in the premises; and

THE COURT having determined that the removal of this action by defendants Whitneys and Ellis was not done in good faith, but rather constitutes a complete disregard by defendant Ellis and Helen B. Ryan, Esq., counsel for defendants Whitneys, of their obligation to this court to investigate the state of the law prior to making spurious allegations such as are contained in their Petition For Removal; and

THE COURT having further found that as a result of the initial hearing on this matter on April 23, 1973 at 11:30 o'clock A. M. Mrs. Ryan had full and complete knowledge of the uniform state of the law holding that removal of cases under Title 28, U.S.C.A., § 1443, applies only to cases involving racial discrimination; and

THE COURT having further found that Mrs. Ryan, with full knowledge of the limitation of the scope of Title 28, U.S.C.A., § 1443 to cases involving racial discrimination, refused the request

of opposing counsel to voluntarily retract the allegations contained in the Petition for Removal relating to said § 1443 and that such refusal further demonstrated her lack of good faith in signing said Petition For Removal; and

THE COURT having further found that Mrs. Ryan and Mr. Ellis have committed a blatant violation of Rule 11, Federal Rules of Civil Procedure in signing the Petition For Removal without first ascertaining the uniform state of the law which makes their Petition completely and totally unsupportable; and

THE COURT having further found that the removal of this case from the Circuit Court of the First Circuit, State of Hawaii, was improvident because of a total and complete lack of federal jurisdiction;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiffs' Motion for Remand be, and the same hereby is, granted and this case is hereby remanded to the Circuit Court of the First

Circuit, State of Hawaii, this court retaining only such jurisdiction as is necessary to enforce the order for the payment of attorney's fees in the next paragraph hereof.

2. That defendants Whitneys and Ellis are hereby ordered to pay to Edward A. Jaffe, counsel for plaintiffs, within fifteen (15) days from the date hereof, the sum of $250.00 to reimburse plaintiffs for their attorney's fees occasioned by the gross and blatant violation by defendant Ellis and counsel for defendants Whitney of Rule 11, Federal Rules of Civil Procedure.

DATED: Honolulu, Hawaii, April 30, 1973.

/s/ Martin Pence
United States District Judge

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE AUGUSTUS POWERS and MACEL WELCOME POWERS,
Plaintiffs-Appellees,

vs.

WILLIAM S. ELLIS, JR., Trustee in dissolution for Kula Development Corporation, HOWARD S. WHITNEY, EDITH G. WHITNEY,
Defendants-Appellants,

and

MOLOKAI PROPERTIES, INC., et al.,
Defendants.

No. 73-2350

[July 1, 1974]

On Appeal from the United States District Court for the District of Hawaii

---

Before: DUNIWAY, CHOY and SNEED, Circuit Judges:

MEMORANDUM

This is an appeal from an order remanding this case to the state court and awarding attorney's fees. Under 28 U.S.C. §1447 (d) we have no jurisdiction to entertain an appeal from a remand order unless the case was removed to the district court pursuant to 28 U.S.C. §1443. Appellants plainly have no cognizable claim under §1443 and any contention to the contrary is frivolous. Therefore, the appeal from the remand order must be dismissed. See *House v. Dorsey*, 4 Cir., 1968, 408 F.2d 1008, 1009.

The award of attorney's fees is properly before us under 28 U.S.C. §1291. The award of fees in this case was a proper exercise of the traditional equitable powers of the district court. *Hall v. Cole*, 1973, 412 U.S. 1, 4-5.

The appeal from the remand order is dismissed and the award of attorney's fees is affirmed.

Appellees' request for allowance of a further attorney's fee on this appeal is denied.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 7-9-74—480

Appendix C

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

73-2350

George Augustus Powers vs William S. Ellis Jr & Molokai Properties

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered on July 1, 1974 Remand order - dismissed Atty. Fees Affirmed Req.Add. Fee denied the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

EMIL E. MELFI, JR., Clerk
U.S. Court of Appeals

Appendix D

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

1. Fifth Amendment, U.S. Constitution

"No person shall . . . be deprived of life, liberty, or property without due process of law . . ."

2. 28 U.S.C.A., Sec. 1443

"Civil rights cases. Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

3. 28 U.S.C.A., Sec. 1446(d)

"(d) Each petition for removal of a civil action or proceeding . . . shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason

of the removal proceedings should it be determined that the case was not removable or was improperly removed."

4. 28 U.S.C.A., Sec. 1447(c)

"(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case."

5. Rule 6, F.R.C.P.

"(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, . . . the day of the act . . . from which the designated period of time begins to run shall not be included . . . When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule . . . , 'legal holiday' includes . . . any . . . day appointed as a holiday . . . by the state in which the district court is held.

. . .

"(d) FOR MOTIONS--AFFIDAVITS. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. . . .

"(e) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has the right or is required to do some act or take some proceeding within the prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

6. Rule 11, F.R.C.P.

"Rule 11. SIGNING OF PLEADINGS. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when ex parte relief is sought upon a pleading or when otherwise specifically provided by rule, pleadings need not be verified or accompanied by an affidavit. . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."